78-575

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES L. TAPLEY
CHARLES N. MARSHALL
920 Fifteenth St., N.W.
Washington, D.C. 20005

MICHAEL BOUDIN
CLARE DALTON
888 Sixteenth St., N.W.
Washington, D.C. 20006

Attorneys for Southern Railway Company

October 1978

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Petitioner Southern Railway Company requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 570 F.2d 1349, appears at Appendix A to this petition. The order of the Interstate Commerce Commission, served September 14, 1977, appears at Appendix B.

JURISDICTION

The judgment of the Court of Appeals, which was entered on February 16, 1978, appears at Appendix C. A timely filed petition for rehearing *en banc* was denied by order entered on May 12, 1978, which appears at Appendix D. Mr. Justice Blackmun extended the time for filing this petition for certiorari to and including October 9, 1978, by orders entered on August 3, 1978, and September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the discretionary refusal of the Interstate Commerce Commission to suspend and investigate a tariff prior to its effective date subject to judicial review, where the refusal does not adjudicate the lawfulness of the rate and leaves the shipper free to challenge the rate in a complaint proceeding on any ground normally available under the Act?

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act appear at Appendix E.

STATEMENT OF THE CASE

A. The Structure of the Act

Under the Interstate Commerce Act ("the Act") railroads initiate rate changes by filing tariffs ordinarily providing 30 days advance notice of the change.[1] When a rate increase is filed, Section 15(8) of the Act, 49 U.S.C. § 15(8), provides that the Commission

[1] Section 6(3) of the Act, 49 U.S.C. § 6(3). See *United States v. SCRAP*, 412 U.S. 669, 672 (1973).

"may" conduct an investigation into the lawfulness of the new rate. If an investigation is ordered, the Commission also "may" under Section 15(8) suspend the effectiveness of the new rate for seven months beyond its original effective date, or under certain limited circumstances, for ten months.[2]

The Commission's powers to suspend and to investigate are closely intertwined. Under Section 15(8), the Commission cannot order a suspension unless it also orders an investigation, and suspension is akin to time-limited temporary relief pending the investigation. Each year, thousands of tariffs are filed by railroads and motor carriers, and the Commission exercises its expert discretion to decide whether to suspend or investigate, depending on its informal judgment about the likelihood of a violation, the significance of the case, and similar conventional factors.

Where the Commission declines to order a suspension or investigation, the rate becomes effective under the statute as a carrier-made rate and is not deemed to be approved or prescribed by the Commission. Thus, any interested party may still, at any time, file a complaint with the Commission under Section 13(1) of the Act, 49 U.S.C. § 13(1), challenging the rate on any ground normally available. Unlike the suspension and investigation power under Section 15(8), the Commission's authority to entertain a complaint under Section 13(1) is not merely permissive. Section 13(1) provides

[2] Section 15(8) was added by the Railroad Revitalization and Regulatory Reform Act ("the 4R Act"), Pub. L. 94-210, 90 Stat. 31, effective February 5, 1976. Prior to the passage of the 4R Act, Section 15(7) of the Interstate Commerce Act, in successive sentences, gave the Commission the same discretionary authority to investigate and to suspend tariffs.

that "it shall be the duty of the Commission to investigate the matters complained of," unless the carrier satisfies the complaint or no basis whatever exists for investigation.

If the Commission finds a violation of the Act in a Section 13(1) complaint proceeding, it may prescribe the lawful rate and forbid any future violation. Section 15(1), 49 U.S.C. § 15(1). In addition, reparations are available to the complaining shipper for past injury. Sections 8 and 9 of the Act, 49 U.S.C. §§ 8-9. A complaint proceeding under Section 13(1) normally results in a final adjudication of the lawfulness of the rate instituted by the railroad, and is subject to full judicial review.

B. The Proceedings and Decision Below

In this case, railroads operating in the Southeast, including petitioner Southern Railway Company, filed a tariff on August 15, 1977, to introduce a seasonal increase in grain rates on 30 days' notice.[3] Shipper protests seeking suspension and investigation of the tariff were filed charging, *inter alia,* that the new rates violated Section 4 of the Act—one of the anti-discrimination provisions—popularly known as the long and short haul clause.[4] It is not unusual for the railroads

[3] Section 202(d) of the 4R Act, codified as 49 U.S.C. § 15(17), provides that the railroads may utilize seasonal rates in order to reduce peak-period shipments, generate additional revenues, and improve the utilization of car supply.

[4] 49 U.S.C. § 4. In substance, this provision makes it unlawful for a carrier to charge higher rates for a shorter distance than for a longer distance which includes the shorter one, unless the approval of the Commission is obtained.

to seek and receive ICC permission to "depart" from Section 4, but no such permission was sought in this case because the railroads did not believe that their rate change would result in violations of Section 4.

On September 14, 1977, the Commission announced that it "decline[d] to exercise [its] authority to suspend," and had determined not to investigate the increase. Pet. 3b. The Commission did not purport to adjudicate the existence of any Section 4 violations; indeed, it admonished the railroads to remove promptly any Section 4 violations that might be called to their attention. Pet. 2b. Since the Commission declined to intervene, the tariff should have taken effect by operation of law on September 15.

On September 14, however, certain shippers obtained an *ex parte* stay from the United States Court of Appeals for the Eighth Circuit. See pet. 5a. The stay was dissolved after a hearing on September 22, 1977 (Pet. 15a), and the rates became effective on September 24, 1977. Judicial review then proceeded, despite the objection of the Commission and the railroads that a refusal to suspend and investigate was not a reviewable order.[5]

On February 16, 1978, the lower court issued its decision. 570 F.2d 1349 (Pet. 1a). The court determined that the Commission's refusal to suspend and investigate was a reviewable order and the court stated that it did not agree with a recent decision of the District of Columbia Circuit holding the contrary in *Asphalt Roofing Manufacturers Association* v. *ICC,* 567 F.2d 994 (D.C. Cir. 1977). Pet. 11a-12a. The lower court's

[5] See 28 U.S.C. § 2342(5), providing for review of "final" orders of the Commission.

discussion of reviewability revealed basic misunderstandings about the Commission's processes and about the legal significance of a refusal to investigate. See pp. 8-11, below.

Having determined that it could review the Commission's order, the lower court concluded that it was not satisfied with the Commission's determination not to investigate. The lower court vacated the Commission's order and directed the Commission to investigate the Section 4 charges on the merits and "to make findings and determinations based upon such investigation." Pet. 13a. Although the lower court did not enjoin the tariff, the court ordered the Commission to make "provision for refund" if the Commission subsequently determined after investigation that the tariff was unlawful. Pet. 14a.

The Commission petitioned for rehearing *en banc* pointing out that the decision was not only both incorrect and "of enormous practical importance," but also placed the lower court "squarely in conflict" with the District of Columbia Circuit. ICC rehearing pet. 2. The lower court initially called for briefs in opposition to the petition for rehearing. Thereafter, it denied the petition for rehearing without further opinion. Pet. 1d.[6]

[6] Although the seasonal tariff has now expired, the case is clearly not moot because the Commission remains under a mandate to engage in the investigation of that tariff and also to provide refunds, depending upon the outcome of the mandated investigation. In addition, the importance and recurring nature of the issue of reviewability (See pp. 12-15, below) would preclude mootness even if the investigation and refund mandate did not exist. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165 n.6 (1977); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515-16 (1911).

ARGUMENT

Certiorari is warranted in this case because, on a jurisdictional issue of recurring importance, the lower court's decision directly conflicts with a recent decision of the District of Columbia Circuit. In addition, the lower court has ignored or misconstrued applicable decisions of this Court and other courts. Finally, the decision reached by the lower court will create a substantial and wholly unnecessary increase in administrative and judicial proceedings, cause irreparable injury by delaying needed rate adjustments, and frustrate Congress' desire for swifter resolution of rate proceedings.

I. The Lower Court's Decision Conflicts With a Holding of the District of Columbia Circuit and With Settled Precedent in Other Courts.

The lower court held in this case that the Commission's determination not to investigate a railroad filed tariff under the suspension and investigation provisions of the Act is a reviewable order. This holding is, as the lower court recognized (Pet. 11a), in square conflict with a recent decision of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977). There, the District of Columbia Circuit canvassed the relevant cases and concluded that orders permitting railroad rates to go into effect without suspension or investigation are unreviewable.[7]

In addition to this direct conflict, the courts of appeals and three-judge district courts have for many

[7] *Asphalt Roofing* involved a number of different orders issued in different proceedings. The holding pertinent here related to orders in *Ex Parte Nos. 305 and 313*, which refused to suspend or investigate railroad-filed tariffs.

years held that refusals to suspend are unreviewable.[8] This rule, described by the Second Circuit as "unassailable" in *Port of New York Authority, supra,* 451 F.2d at 786 n.12, is directly pertinent to refusals to investigate. The power to suspend and the power to investigate are closely interrelated, are conferred in almost identical permissive language, and are clearly to be construed *in pari materia.* "There is therefore no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability." *Asphalt Roofing Manufacturers Association* v. *ICC, supra,* 567 F.2d at 1002.

The underlying reasons for avoiding judicial review are quite similar in both situations. Whether the Commission refuses to suspend or refuses to investigate, the shipper retains a complaint remedy under Section 13(1) of the Act, including a right to reparations. See p. 11, below. By contrast, premature judicial intervention, before the Commission has reached a decision on the merits in a complaint case, threatens to disrupt the timing of rates, to hinder the Commission's exercise of its primary jurisdiction, and to multiply both administrative and judicial proceedings without serving any useful function. See pp. 12-15, below.

The issue on which the lower federal courts are now in conflict is a fundamental one affecting a carefully

[8] See, *e.g., Port of New York Authority* v. *United States,* 451 F.2d 783, 786 & n.12 (2d Cir. 1971); *National Industrial Traffic League* v. *United States,* 287 F. Supp. 129, 132 (D.D.C. 1968), *aff'd per curiam,* 393 U.S. 535 (1969); *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977, 981 (W.D. Wis. 1967); *Carlsen* v. *United States,* 107 F. Supp. 398, 399 (S.D.N.Y. 1952). A number of the lower court precedents were cited with approval by this Court in *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 670 (1963).

wrought Congressional plan for carrier rate changes. See *Arrow Transportation Co.* v. *Southern Ry., supra,* 372 U.S. at 663-68. The lower court's decision has implications for other regulatory agencies as well: the power to suspend and investigate new tariffs is conferred, in quite similar language, on a number of other agencies, including the Federal Communications Commission, the Civil Aeronautics Board, and the Federal Power Commission.[9] Under these circumstances the conflict between the circuits amply warrants certiorari.

II. The Lower Court's Decision Conflicts With and Misconstrues Decisions of This Court.

This Court has repeatedly held that a mere refusal of an administrative agency to undertake an investigation is not a reviewable determination. See *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (refusal of NLRB to issue complaint); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (refusal of FTC to issue complaint); *New Jersey* v. *United States,* 168 F. Supp. 324, 329 (D.N.J. 1958), *aff'd per curiam,* 359 U.S. 27 (1959) (refusal of ICC to investigate train discontinuance). Where the agency merely declines to begin an investigation, the decision is akin to a decision by the Department of Justice not to prosecute, and it implicates similar considerations relating to the agency's internal pro-

[9] In cases concerning the suspension and investigation powers conferred on these agencies, the District of Columbia Circuit has uniformly held that refusals to suspend are unreviewable. In light of *Asphalt Roofing,* it is apparent that the court would reach the same decision with respect to refusals to investigate. See *Associated Press* v. *FCC,* 448 F.2d 1095, 1103 (D.C. Cir. 1971); *Delta Air Lines, Inc.* v. *CAB,* 455 F.2d 1340 (D.C. Cir. 1971); *Municipal Light Boards* v. *FPC,* 450 F.2d 1341, 1351 & n.21 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972).

cesses, including a judgment by the agency as to the best use of limited enforcement resources.

This Court's *per curiam* affirmance in the *New Jersey* case is especially significant. There, a railroad filed a discontinuance notice under Section 13a of the Act, 49 U.S.C. § 13a, which allows the Commission to investigate a proposed train discontinuance. A reviewing court held that the Commission's refusal to investigate was committed "to the absolute discretion" of the agency. Not only did this Court affirm the decision, but it subsequently cited the case as holding that "whether the Commission should make an investigation of a § 13a(1) discontinuance is *of course* within its discretion, a matter which is *not reviewable.*" [10]

The rule against judicial review of agency decisions not to investigate applies with special force where, as here, the shipper retains a complete and adequate remedy to secure a determination of the lawfulness of any rate affecting the shipper. Under Section 13(1) of the Act, a shipper can file a complaint at any time challenging a rate that the Commission has refused to investigate initially; and it can secure both a determination of the lawfulness of the rate and, where appropriate, reparations from the carrier. Decisions in complaint cases, after the Commission has reached a determination on the merits, provide the shipper with an ample basis for securing judicial review.[11]

[10] *City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969) (emphasis added). *City of Chicago* held that a limited exception, allowing review, existed where the agency found sufficient reason to begin an investigation but then terminated it after a finding on the merits that discontinuance was justified under the public interest standard. Since this Court determined that the Commission had been "deciding the merits" (*id.* at 166), it found review was appropriate. The lower court's reliance on *City of Chicago* in this case is patently incorrect. The Commission in this case did not commence a Section 15(8) investigation but determined not to begin one; and it did not decide the Section 4 issue on the merits, as the lower court wrongly supposed, but actually made clear that it was not determining whether any Section 4 violation existed. See p. 5, above.

In view of the complaint remedy, the lower court's decision also offends the principle of exhaustion of administrative remedies repeatedly reaffirmed by this Court.[12] If the exhaustion doctrine had been respected in this case, all of the adverse effects that have followed the lower court's attempt to review the agency's refusal would have been avoided: there would have been no temporary stay delaying the rate change and inflicting irreparable injury on the railroads; the lower court would not have been required to make premature observations about the alleged violations; and extensive

[11] The lower court is patently in error when it implies that the complaint remedy is inadequate because allegedly "the Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal." Pet. 10a. Section 13(1) broadly provides that any person or company may file a complaint complaining "of *anything* done or omitted to be done by [a rail carrier], in contravention of the provisions [of Part I of the Act regulating rail carriers] . . . ." (emphasis added).

[12] Indeed, a number of cases under the Interstate Commerce Act concerning refusals to suspend or investigate rate changes have emphasized the exhaustion doctrine or the availability of the complaint remedy as a reason for holding the orders unreviewable. For example, in *National Water Carriers Association* v. *United States*, 126 F. Supp. 87 (S.D.N.Y. 1954), Judge Swan said that the ICC's "refusal to suspend a rate is not judicially reviewable . . . . The plaintiffs still have their administrative remedy of attacking the rates by formal complaint." *Id.* at 90-91.

appellate proceedings would have been deferred until there was an adequate administrative record based on resolution of a complaint proceeding.

The lower court has also seriously misconstrued the two decisions of this Court, including the *City of Chicago* case cited above and *Alton R.R.* v. *United States,* 287 U.S. 229 (1932). An examination of both cases shows that the agency orders held subject to judicial review were orders disposing of the controversies involved *on the merits.*[13] There is all the difference in the world between an order adjudicating a controversy, as in *City of Chicago* and *Alton,* and an agency refusal which, as in the present case, declines to commence an investigation but does not impair the shipper's right to obtain an adjudication in an appropriate complaint proceeding.

III. The Lower Court's Decision Will Seriously Complicate and Delay Rate-Making Proceedings and Create Unnecessary Burdens for the Agency and the Courts.

The lower court's decision would have far-reaching and severe adverse consequences for the administrative process. Literally thousands of tariffs are filed with the Commission every year. The Southern Freight Tariff Bureau alone makes about 3000 filings a year with the ICC and such filings are made by about 10 other tariff publishing bureaus serving the railroads and by many

[13] In *City of Chicago,* the Commission had upheld a train discontinuance on the merits. See p. 10, n. 10, above. In *Alton,* the Commission, after a full investigation, upheld the challenged portion of a divisions order based on a finding that the divisions were "not unjust, unreasonable or otherwise unlawful." 287 U.S. at 231, 237.

individual railroads. Numerous other filings are made by trucking bureaus and individual truck lines.[14]

Within the brief notice period, usually 30 days, the Commission must determine whether to launch an investigation and whether to suspend the rate, based on its own informal appraisal and any request to suspend and investigate that may be filed by interested shippers. Whether it is refusing to suspend or refusing to investigate, the Commission makes no more than a "preliminary assessment" (*United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16), and its determination whether to suspend or investigate has always been an informal and swift judgment. *Port of New York Authority* v. *United States, supra,* 451 F.2d at 789-90. If the Commission must now make the kind of findings that the lower court contemplates before deciding whether to begin or defer an investigation, this phase of the process will be vastly altered and enlarged.[15]

In contemplating expanded agency proceedings and additional judicial review, the lower court's decision moves in exactly the wrong direction. The concern of Congress, in its recent revisions of the Act, has been to reduce overzealous regulation, to correct problems

[14] The basic suspension and investigation powers of the Commission are applicable to motor carrier tariffs under a provision comparable to Section 15(7). See Section 316(g), 49 U.S.C. § 316(g).

[15] The lower court complains that the Commission's "order reflects no supporting findings or a reasonable basis for [declining to investigate], at least with respect to the charged § 4(1) violations." Pet. 11a. Significantly, the Act itself does not require any statement of reasons or findings when the Commission declines to suspend or investigate. Compare Section 15(7), no longer applicable to rail carriers, requiring a statement of reasons only where a rate is suspended.

created by "the inflexibility of the present regulatory scheme," and to avoid "delays" in rate adjustments which are "particularly troublesome in our current inflationary system." [16] The lower court's grant of a temporary stay in this case, incident to its judicial review, actually delayed the implementation of innovative "seasonal" rates which Congress deliberately sought to encourage in the 4R Act. See Section 15(17) of the Interstate Commerce Act, 49 U.S.C. § 15(17).

The impairment of the administrative process is all the more unwarranted because it provides the shipper with "two bites at the same apple." If refusals to suspend and investigate are judicially reviewable, shippers can attack the rates at that point, seeking simultaneously to stay the rate adjustments.[17] If the challenges are unsuccessful and the Commission is upheld in refusing to investigate, the shipper can then file a complaint under Section 13(1) to obtain a final Commission adjudication followed by judicial review.

This multiplication of administrative determinations and judicial review proceedings is burdensome to the

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[16] See S. Rep. No. 199, 94th Cong., 1st Sess. 10-11 (1975), addressed to the 4R Act, which broadly amended the Interstate Commerce Act. Significantly, in the 4R Act, Congress both limited the basis for suspending newly filed rates (see Section 15(8)(d)) and prohibited any suspension at all in certain circumstances (Section 15(8)(b)).

[17] Petitioner believes that the stay granted by the lower court was plainly invalid under the *Arrow* doctrine. The fact remains, however, that courts do seek to stay rate adjustments once they are persuaded that they do have jurisdiction to review asserted agency error. Unlike the shipper, who is protected by the reparations remedy, the railroad's losses are irreparable when an increase is postponed.

courts as well as to the Commission. Yet, in light of the shipper's complaint remedy, it is wholly unnecessary to establish such a new layer of administrative determinations and judicial review in order to protect the legitimate rights of shippers. The severe impact that the lower court's decision will have upon long-established administrative processes is a final reason why certiorari is warranted in this case.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

JAMES L. TAPLEY
CHARLES N. MARSHALL
920 Fifteenth St., N.W.
Washington, D.C. 20005

MICHAEL BOUDIN
CLARE DALTON
888 Sixteenth St., N.W.
Washington, D.C. 20006

Attorneys for Southern Railway Company

October 1978

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

SEABOARD ALLIED MILLING CORP. et al., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION et al., *Respondents.*

BOARD OF TRADE OF THE CITY OF CHICAGO et al., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION et al., *Respondents.*

Nos. 77-1729 and 77-770.

Submitted Jan. 13, 1978.

Decided Feb. 16, 1978.

Rehearing and Rehearing En Banc

Denied May 12, 1978.

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John H. Caldwell, Washington, D. C., argued, for petitioners in case no. 77-1729, Seaboard Allied Milling Corp., et al., and on brief, for petitioners-intervenors Southeastern Poultry and Egg Assn.

Robert L. Thompson, App. Sec., Antitrust Div., U. S. Dept. of Justice, Washington, D. C., argued, for respondent, United States.

Harold E. Spencer (argued), Thomas F. McFarland, Jr., and Richard S. M. Emrich, III, Chicago, Ill., and W. Thomas McGhee, St. Louis, Mo., on brief, for petitioners, Board of Trade of the City of Chicago, et al.

Mark L. Evans, Gen. Counsel and Charles H. White, Jr., Associate Gen. Counsel, ICC (argued), Washington, D. C., on brief, for respondent, Interstate Commerce Commission.

Wandaleen Poynter, Jacksonville, Fla. (argued), Charles N. Marshall, Washington, D. C. (argued), Richmond C. Coburn, Adrian L. Steel, Jr., St. Louis, Mo., and

Michael Boudin, Washington, D. C., on brief, for Railroad intervenors-respondents.

Rufus L. Edmisten, Atty. Gen., Richard L. Griffin, Associate Atty. Gen., Raleigh, N. C., on brief, for State of North Carolina.

John C. Noonan and Arthur J. Cerra, Kansas City, Mo., Peter A. Greene and Neal A. Jackson, Washington, D. C., on brief, for petitioners-intervenors Southeastern Poultry and Egg Association.

Theodore L. Sendak, Atty. Gen. of Indiana, William G. Mundy, Deputy Atty. Gen., Indianapolis, Ind., on brief, for intervenor-petitioner, State of Indiana, et al.

Before GIBSON, Chief Judge, and VAN OOSTERHOUT and MATTHES, Senior Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These are consolidated actions brought to set aside the Interstate Commerce Commission's orders in Docket 36663, Demand-Sensitive Rates in Grain and Soybeans—Southern Freight Association Territory (SFA). The Commission in its orders refused to suspend and to investigate the railroads' proposed tariff providing a 20% increase in rail rates applicable from September 15 through December 15, 1977, on 29 grain products shipped to and within SFA territory and to stations in SFA territory from limited points in Illinois and Indiana. The rate increase applied only to carriage in railroad owned cars, not to carriage in privately owned cars. The increase was sought pursuant to § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 49 U.S.C. § 15(17).[1]

[1] Such Act provides:

> Within one year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

The proposed tariff was published and filed with the Interstate Commerce Commission on August 18, 1977, by the SFA authorized agent for the interested railroads and was to become effective on September 15, 1977. Protests were filed with the Interstate Commerce Commission by some 35 separate entities or organizations representing major elements of the agricultural community including many large-scale poultry producers who used considerable quantities of transported grain. Most of them are plaintiffs or intervenors in these consolidated actions.

The issues here raised were raised before the Commission. The affected railroads responded to such protests. Included were the contentions that the Commission should suspend the tariff and investigate the charges that the tariff violated the long-and-short haul provisions of 49 U.S.C. § 4(1), that applying the increase only to railroad-owned cars was discriminatory, and that the increase did not serve the purpose of § 15(17) and the regulations promulgated thereunder, published in 49 C.F.R. §§ 1109.-10 *et seq.*

On September 14, 1977, Division Two of the Commission, consisting of three members, filed a summary order reciting that 49 U.S.C. §§ 1, 2, 3, 4, and 15(17) violations had been charged but not established and denied petition

for review of the tariff. On the same date the entire Commission in an order states:

> Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.
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>
> The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis,* 120 I.C.C. 216, 221 (1926).
>
> Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

> • • • • • •
>
> This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.
>
> *It is ordered,* that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations of origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. * * * This requirement is subject to later refinement or modification by the Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

Seaboard Allied Milling Corporation, *et al.,* on petition to this court on September 14 obtained ex parte temporary stay of the Commission's orders refusing to suspend the operation of the tariff and permitting it to become effective. Another panel of this court, after a hearing on briefs and oral argument, set aside the stay order. A copy of such order not heretofore published is attached hereto as Appendix A.

Thereafter the Commission by order dated September 23, 1977, permitted the carriers to implement its proposed

tariff on one day's notice. Such notice was given and the tariff was placed in effect. This court in its order of September 22 states petitioners made a strong showing that this court has jurisdiction to grant the stay but that upon a balancing of equities the temporary stay should be dissolved. The order however provides:

> Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as well be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

The Commission's order of September 23 contains substantially the same provision. Such directions were authorized by § 15(8)(e) and by general equitable principles. Such provisions at least strongly tend to indicate that uncertainty in the lawfulness of the proposed tariff exists.

Petitioners claim the Commission erred in not suspending the operation of the proposed tariff on the basis that it was patently in violation of statutory law. The United States, the Interstate Commerce Commission and the railroads all contend that the Commission has a large degree of discretion in suspension matters and that its action in refusing to suspend the operation of the tariff is not subject to judicial review. Respectful authority supports this contention. *United States* v. *SCRAP*, 412 U.S. 669, 698, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 667-68, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). In any event, the period covered by the seasonal tariff has long since expired and the resolution of the jurisdiction to review the suspension order has no significant impact on the result of this case. The protective orders of this court and the Commission protect the rights of the petitioners in event the court finds it has a right to review the Commission's refusal to

continue the investigation of the validity of the proposed tariff and finds it to be unlawful.

The critical issue in this case is whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff. The United States and the petitioners vigorously assert jurisdiction exists. They contend that the proposed seasonal rate violates the long-and-short haul rate differential set forth in 49 U.S.C. § 4(1). Such section prohibits common carriers from receiving any greater compensation for transportation for a shorter haul than for a long distance haul over the same line or route in the same direction, or to charge greater compensation as a through rate than the aggregate of the intermediate rates. The statute also provides that the carrier upon application and investigation by the Commission in special cases may be authorized by the Commission to charge less for longer than for shorter distances. No application under the foregoing provision has been made, investigated or considered by the Commission.

The Commission in its order above quoted acknowledges that the protestants have cited instances in support of their contention that the proposed tariff violates § 4(1). Protestants also urge that if more time were available additional violations could be found. Violation of the long-and-short haul provisions are denied by the railroads upon whom the burden rests to support the lawfulness of the tariff. The Commission in its order summarily holds that the evidence does not support § 4 violations to a sufficient extent to warrant suspension of the tariff and finds it unnecessary to further investigate the asserted violations. The Commission goes on to say: "However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any. . . ." Reliance is also placed on the railroads' promise to avoid § 4 violations.

This may be difficult to do with the approved tariff requiring payment of charges in accordance with the tariff provisions approved by the Commission. As heretofore stated, we are not reviewing the Commission's discretion to suspend the tariff.

We accept the view of the United States and the protestants that the suspension powers and investigation powers are separate and distinct. The Commission has statutory authority to investigate the lawfulness of its tariffs. It is not contended that § 15(17) modifies or repeals the requirements of § 4(1). In any event, we hold that it does not.

The factors which prompted the Supreme Court in *Arrow Transportation Co. v. Southern Railway Co., supra,* to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff. The United States in support of its view at pp. 15 and 16 of its brief states:

> In contrast to the suspension power, Congress granted the Commission the power to investigate *proposed* rates because it viewed the power to investigate only *existing* rates as an inadequate remedy for the protection of shippers and the public. It authorized the Commission to order an investigation into proposed rates upon complaint by an interested party or upon its own intiative. *See* 49 U.S.C. 15(8)(a). The Commission's authority to investigate proposed rates before their effective dates was consciously made coextensive with its prior-existing power to investigate existing rates which were the subject of section 13(1) complaints. [I Sharfman, *The Interstate Commerce Commission* at 58 (1931)]. The Congressional purpose underlying sections 13(1) and 15(8) is the same, insofar as both authorize the Commission to investigate and make orders with respect to the legality of rates, differing only as to when the Commission commences

> its investigation. For purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency. See S.Rep. 355, [61st Cong., 2d Sess.], at pages 8-9.

We note that the Supreme Court has not passed on the reviewability of the issues before us. *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289, 317-18, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975).

A finding that the court has jurisdiction to review the Commission's determination not to pursue its investigation is consistent with finding that the review of a similar action by the Commission is available. *Alton Railroad Co. v. United States,* 287 U.S. 229, 236-37, 53 S.Ct. 124, 77 L.Ed. 275 (1932). Likewise, the Commission's decision to terminate investigation commenced pursuant to § 13a(1), involving the discontinuance of service by a carrier, has been held to be reviewable. *City of Chicago v. United States,* 396 U.S. 162, 90 S.Ct. 309, 24 L.Ed.2d 340 (1969). In footnote 5 of that case at p. 166, 90 S.Ct. at p. 312, the court states:

> The Administrative Procedure Act, 5 U.S.C. § 551(6) (1964 ed., Supp. IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U.S.C. §§ 551(13), 701(b)(2), 702 (1964 ed., Supp. IV).
>
> When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers*

Assn. v. *Baltimore & O.R. Co.*, 314 I.C.C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc.* v. *United States*, D. C., 226 F.Supp. 318, aff'd, 379 U.S. 6, 85 S.Ct. 49, 13 L.Ed.2d 21.

We recognize the right of review in rate cases is a narrow one. *See Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 806-07, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion); *North Dakota State Wheat Commission* v. *United States*, 565 F.2d 621 (8th Cir. 1977). The Commission's expertise in the field must be given considerable respect. The unlimited discretion would appear to have more weight in resolving economic issues. Significant policy reasons exist for review of the lawfulness of the proposed rate under the facts of this case. If the Commission's decision not to pursue an investigation of the factual background relevant to the legality issue is unreviewable, the protestants only resort would be to file a § 13(1) complaint once the rates became effective. The Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal. Moreover, in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate. In a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff.

It is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff. While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its

order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4(1) violations. Its order in effect is a final order on the § 4(1) issue.

The Commission and the railroads urge that *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 186 U.S.App.D.C. 1, 567 F.2d 994 (D.C. Cir. 1977), supports their position that the Commission's termination of its investigation is not a reviewable order.

We agree with the statement in that opinion reading:

> The Supreme Court in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 314-18 [95 S.Ct. 2336, 45 L.Ed.2d 191] (1975) (SCRAP II) . . . expressly declined to resolve the issue whether an ICC "decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review . . . absent exhaustion of § 13 remedies . . .." 422 U.S. at 317-18, n.18 95 S.Ct. at 2354 (emphasis by the Court). The Court in *SCRAP II* did, however, hold that the Commission's conclusion at the close of a general revenue proceeding "that it need give no further *consideration* to environmental factors [under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-35 (1970)], *in that proceeding*" was a final decision subject to judicial review, 422 U.S. at 318-19, 95 S.Ct. 2336 (emphasis by the Court.)

Id. at 8, 567 F.2d at 1001. We disagree with the conclusion that the Commission decisions not to pursue an investigation are under all circumstances not final decisions subject to judicial review and with the reasoning upon which such conclusion is based. *Id.* at 8, 567 F.2d at 1001.

The substantial violations of specific statutory requirements here alleged, apart from the economic issues, are matters that should be fully investigated and decided with appropriate findings and conclusions. Failing so to do places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs.

There is as great a justification for treating the Commission's order terminating the investigation as a final order subject to judicial review as there is for the holding in *Aberdeen & Rockfish R. Co. v. SCRAP, supra* 422 U.S. at 318-19, 95 S.Ct. 2336, that the Commission's determination in the general revenue proceeding to give no further consideration to environmental factors in that proceeding is a final order subject to judicial review. As stated by the Court: "[W]hatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates." A similar reasoning should apply when substantial charges of patent illegality in the tariffs are made.

We believe that the purposes of judicial and administrative efficiency will be best served by permitting review of the termination by the Commission of its investigation. Such procedure would eliminate the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court. As above noted, the burden in a § 13(1) proceeding would be on the complainants to show that the tariff was unlawful and that they were adversely affected by it.

The Commission in its brief, at pp. 11 and 12, states: "While it may be true that patently illegal tariff proposals may be rejected, we strongly assert that this is not the posture in the present case." We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short-and-long haul provision of

§ 4(1) but do hold that the charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation.

What has heretofore been said is sufficient in itself to require a vacation of the Commission's premature termination of its investigation of the § 4(1) charge and a remand of such issue to the Commission for an adequate investigation and findings based upon the investigation. A remand of such issue to the Commission for an adequate investigation and findings based thereon should be made.

We also have considerable doubt of the adequacy of the investigation with respect to the rate discrimination charges arising from the exemption of cars not owned by the railroads. Compensation for use of nonowned cars is prescribed by tariffs and the probability exists that the tariff compensation for the use of non-railroad cars has been paid. Thus a serious question arises whether illegal preference is given owners or lessees of privately owned cars to the detriment of shippers using railroad owned cars and whether by reason thereof producers and purchasers of grains shipped in railroad cars have been prejudiced by such an arrangement.

We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation.

The Commission is directed to promptly hold hearings to investigate the charges of patent illegality and to make detailed findings and conclusions with respect thereto.

If the Commission after investigation determines that the tariff is unlawful, it shall make appropriate provision for refund of increased charges collected under the tariff.

The Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

Petition for Review of an Order of the Interstate Commerce Commission.

Filed: September 22, 1977

Before MATTHES, Senior Circuit Judge, WEBSTER and HENLEY, Circuit Judges.

Order

On September 14, 1977 petitioners filed a petition for review of the Order of the Interstate Commerce Commission entered on September 14, 1977, in Suspension and Fourth Section Board Case No. 67123, and Office of Proceedings Docket No. 36663. Petitioners simultaneously filed a motion for stay or other injunctive relief with respect to said order. On September 14 we granted a temporary stay and granted respondents until September 21, 1977 to respond.

In the interim several motions have been filed on behalf of various interested parties for leave to intervene. All pending motions to intervene are hereby granted.

In the order of the Interstate Commerce Commission sought to be reviewed, the Commission refused to suspend the September 15, 1977 effective date of proposed rate

tariffs published by the Southern Freight Association increasing freight rates on railroad owned cars approximately 20% from September 15, 1977 to December 15, 1977. These so called demand-sensitive rates were based on § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 15(17). In opposing the tariffs and in support of suspension thereof by the Commission, petitioners asserted, *inter alia,* that the new rates violated the longhaul-shorthaul provisions of 49 U.S.C. § 4(1), as well as §§ 1(5), 1(6), 1(11) to 3(1) and 15(17) of the Interstate Commerce Act. These contentions were rejected by the Commission.

Respondents contend that this Court is without jurisdiction to grant the stay, relying primarily upon *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). Petitioners contend that the patent illegality of the tariffs brings this case within an exception to *Arrow Transportation Co. v. Southern Ry., supra,* at 671, n.22, 83 S.Ct. 984 and that the stay is necessary to protect them from irreparable injury pending this Court's review of the merits.

We have reviewed the briefs and papers on file and have heard extensive oral argument by the parties, and intervenors this date. Considering the circumstances by which this case comes to us, it appears to be *sui generis.* Petitioners have made a strong showing that this Court has jurisdiction to enter the stay. After balancing the equities under the traditional tests of *Virginia Petroleum Jobbers Assn. v. F. P. C.,* 104 U.S.App.D.C. 106, 259, F.2d 921 (1958), however, we are satisfied that the temporary stay heretofore granted should be and it is hereby dissolved.

Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

APPENDIX B

Service Date, September 14, 1977

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of September, 1977.

No. 36663 [1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS—SOUTHERN FREIGHT ASSOCIATION TERRITORY

This order concerns the following rate tariff schedules: SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

Generally, these proposals involve a 20 percent increase on grain movements in railroad-owned cars between September 15 and December 15, 1977, inclusive. The proposals apply to barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans from, to and between points in the Southern Territory, and Indiana and Illinois. See Appendix A for a listing of the STCC numbers.

The schedules were published by Southern Freight Association (SFA) pursuant to the regulations (49 CFR § 1109.10, as amended) established by the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peak-Period Demand for Rail Service,* —— I.C.C. —— decided January 28, 1977.

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[1] Suspension No. 67123

Although optional under the regulations, a justification statement accompanied the tariff publication. Little cost evidence, also optional under the regulations, was offered. However, SFA did indicate that an incentive was necessary to help level-out the demand for rail cars during the peak season but that lower off-peak rates were not feasible since grain rates are generally depressed in the south.

More than 20 parties protested the proposal and assailed the justification statement. The principal objections were (1) the proposal is unreasonable and excessive and in violation of section 1 (5) of the Interstate Commerce Act (the Act); (2) the proposal results in unjust discrimination, undue preference and prejudice in violation of sections 2 and 3 (1) of the Act; (3) the proposal does not meet the goals set out in Ex Parte No. 324. SFA replied to these protests.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with interterritorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

Section 15(8)(d)(ii) of the Act conditions the Commisson's power to suspend rates in excess of a just and reasonable maximum on a finding of market dominance. Some protestants offered evidence of market dominance in cer-

tain situations. However, there has been no attempt to demonstrate the existence of market dominance throughout the entire affected area. To the extent that market dominance may exist, we nevertheless decline to exercise our authority to suspend this experimental rate proposal, which appears to be in general conformity with the goals of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), because we are not convinced that protestants have sustained their burden on the section 1(5) assertions.

The section 2 and 3 (1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216, 221 (1926).

Other section 2 and 3 (1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

We will order the respondent carriers to make weekly reports to this Commission demonstrating the effect of the schedules. This should not prove burdensome to the carriers since they already provide a large portion of the information to the Association of American Railroads. We stress that this action should not be viewed as a measure that will be used in future Ex Parte No. 324 filings. It is only being used here because of the unique circumstances and the broad application of the schedules.

The Commission was directed to establish a regulatory climate conducive to rate innovation and experimentation by the Congress in the 4-R Act. Ex Parte 324 was a direct result of that directive.

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

By the Commission. (Vice Chairman Clapp and Commissioner Christian did not participate.)

(SEAL)

H. G. HOMME, JR.
Acting Secretary

Appendix A

STCC No.	Commodity Description
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtures
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer
0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans, fresh

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., *Petitioners,*

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Intervenor-Respondents.*

No. 77-1770

BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION, and ST. LOUIS GRAIN CORPORATION, *Petitioners,*

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAIROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Intervenor-Respondents.*

Petition for Review of an Order of the Interstate Commerce Commission

This cause came on to be heard on petitions for review of an order of the Interstate Commerce Commission, appendix and briefs of the respective parties with oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

February 16, 1978

A true copy:

Attest:

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals,
8th Circuit.

May 22, 1978

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1977

Nos. 77-1729 and 77-1770

SEABOARD ALLIED MILLING CORP. ET AL., and BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION ET AL., *Respondents,*

and

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., *Intervenor-Respondents.*

Petition for Review of Order of
Interstate Commerce Commission

Filed, May 12, 1978

Robert C. Tucker, Clerk

The Court having considered petition for rehearing en banc filed by counsel for respondent, Interstate Commerce Commission, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 12, 1978.

APPENDIX E

Section 13(1) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(8) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provides:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own intiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regula-

tion, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title or, following promulgation of standards and procedures under section 1(5)(d) of this title, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this title, over the service to which such rate increase applies; or

(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after February 5, 1976;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following February 5, 1976, is not more

than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the

date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect (in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

Section 15(17) of the Interstate Commerce Act, as amended, 49 U.S.C. § 15(17), provides:

(17) Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional reve-

nues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.